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IN THE
Supreme Court of the United States
October Term, 1991

SAUDI ARABIA, KING FAISAL SPECIALIST HOSPITAL, ROYSPEC
Petitioners,

v.

SCOTT NELSON AND VIVIAN NELSON,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether United States courts have jurisdiction under the commercial activity exception in the Foreign Sovereign Immunities Act to review inherently sovereign law enforcement activities of a foreign state carried out in that country.

2. Whether the Foreign Sovereign Immunities Act confers jurisdiction over a suit challenging the conduct of a foreign state where the commercial activity of that foreign state in the United States is unrelated to the noncommercial conduct forming the basis of the suit.

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SCOTT NELSON AND VIVIAN NELSON,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Kingdom of Saudi Arabia, King Faisal Specialist Hospital, and Royspec,[1] Petitioners herein, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at *Nelson v. Saudi Arabia*, 923 F.2d 1528 (11th Cir. 1991), and is set forth in the Appendix hereto at 1a. The opinion of the United States District Court

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[1]In compliance with Rule 29.1 of the Rules of this Court, Petitioners represent that the Kingdom of Saudi Arabia is a foreign state and that King Faisal Specialist Hospital and Royspec are owned by Saudi Arabia.

for the Southern District of Florida, reversed by the Eleventh Circuit, has not been reported. It is set forth in its entirety in the Appendix hereto at 18a.

GROUNDS FOR JURISDICTION

The Eleventh Circuit issued its decision on February 21, 1991. Petitioners timely filed a petition for rehearing and suggestion for rehearing en banc. The petition was denied on July 1, 1991. In accordance with Rule 13.3 of this Court, this petition for a writ of certiorari was timely filed within ninety days of the date rehearing was denied. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1); 28 U.S.C. § 1602 *et seq.*; and 28 U.S.C. §§ 1330 and 1331.[2]

STATUTES INVOLVED

The relevant portion of the Foreign Sovereign Immunities Act is codified at 28 U.S.C. § 1605(a)(2) and states, "(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state . . . ."

STATEMENT OF THE CASE

Respondents, Scott Nelson and his wife Vivian Nelson,[3] filed this lawsuit against the Kingdom of Saudi Arabia, a foreign

[2]Petitioners note that the Eleventh Circuit's decision denying sovereign immunity in this case is reviewable under the collateral order doctrine as established in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-47 (1949). *See Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990), and cases cited therein. *See also Mitchell v. Forsyth*, 472 U.S. 511 (1985) (immunity includes immunity from trial).

[3]"Respondent" as used in the singular herein shall refer to Scott Nelson only, unless otherwise indicated, because Vivian Nelson's claims are entirely derivative.

state; King Faisal Specialist Hospital (KFSH or the "Hospital"), a government-owned hospital in Riyadh, Saudi Arabia; and Royspec, the Hospital's purchasing agent in the United States. Respondent seeks to recover for personal injuries allegedly inflicted by Saudi law enforcement officials in the course of his arrest and imprisonment in Saudi Arabia in September and October 1984. At the time of his arrest, Respondent was employed in Saudi Arabia as a monitoring systems engineer at the Hospital. He had previously been employed by an American corporation in Saudi Arabia.

During a respite in the United States from his work in Saudi Arabia, Respondent saw the Hospital's advertisement for an opening in Riyadh. The Hospital Corporation of America (HCA), a privately owned American corporation under contract with Saudi Arabia to assist in recruitment for the Hospital, had placed the advertisement.

Upon returning to Saudi Arabia, Respondent submitted an application for the position of monitoring systems engineer to the Hospital. In his application for employment, Respondent falsely represented that he was a graduate of the Massachusetts Institute of Technology (M.I.T.). During the application process he also submitted a forged M.I.T. diploma to the Hospital. Respondent subsequently had two interviews in Saudi Arabia for the position with the Hospital. In November 1983, while on a brief trip back to the United States, Respondent received an offer for the position in Saudi Arabia and executed an employment contract. One month later, he attended an orientation session conducted by HCA in Tennessee before flying to Saudi Arabia to commence his employment at the Hospital.

Respondent resided in Saudi Arabia and worked at the Hospital for several months without incident. This uneventful period ended when he allegedly discovered a safety violation

at the Hospital. He allegedly reported the violation to various officials of the Hospital and to other officials of the Saudi government. Around this time, officials at the Hospital discovered that the diploma Respondent had submitted to the Hospital was a forgery. In September 1984, Saudi law enforcement officials arrested and imprisoned Respondent on charges that he had falsified his employment credentials by submitting the forged M.I.T. diploma.[4] Respondent spent thirty-nine days in detention before the Saudi government, at the request of a member of the United States Congress, ordered his release.[5]

Respondent alleges that after his arrest, he was tortured in retaliation for reporting a safety violation at the Hospital. He further alleges battery, "unlawful detainment", wrongful arrest and imprisonment, "inhuman torture", "disruption of normal family life", and "mental anguish" as well as negligent failure to warn of the risk of imprisonment and torture. The complaint also includes Respondent Vivian Nelson's derivative claims based on these allegations. The complaint asserts that subject-matter and personal jurisdiction are conferred by 28 U.S.C. § 1331; the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1602 *et seq.*; Florida's long-arm statute applicable to non-residents doing business in Florida, Fla. Stat. § 48.181; and the Alien Tort Statute, 28 U.S.C. § 1350.

Respondent relied exclusively on clause one of the "commercial activity exception" to foreign sovereign immunity to

[4]It is a crime in Saudi Arabia to make a false statement to the government, just as it is a crime in the United States. *See, e.g.*, 18 U.S.C. § 1001 (1988).

[5]Almost four years elapsed between Respondents' return to the United States and their filing suit. At all times and still today, Saudi Arabia has assured Respondents and their counsel that Saudi Arabia will provide them with visas and guarantee safe passage to pursue the adjudication of their claims in the appropriate forum in Saudi Arabia. To date, Respondents have declined the offer.

confer jurisdiction on the district court.[6] The district court considered whether Respondent's claims were "based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. § 1605(a)(2) (1988). The court concluded that Respondent's claims against Saudi Arabia and the Hospital did not meet this standard for two reasons.

First, a foreign sovereign engages in commercial activity in the United States within the meaning of the FSIA only if its commercial activity has "substantial contact with the United States." *Id.* §1603(e). The district court found that the commercial activity of the Hospital and the Kingdom did not have "substantial contact with the United States," even if the acts of HCA with respect to Respondent were imputed to Petitioners *Nelson v. Saudi Arabia*, No. 88-1791, slip op. at 6 (S.D. Fla. Aug. 11, 1989), App. at 22a. The district court emphasized that "[Respondent] was interviewed by KFSH in Saudi Arabia, . . . the employment contract was to be performed in Saudi Arabia," and the definition of "substantial contact" in the FSIA requires more significant activity than the "happenstance" of signing an employment contract in Florida. *Id.*

The district court also concluded that even if the indirect recruitment activities in the United States were viewed as a

[6]Clause one confers jurisdiction "in any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. § 1605(a)(2) (1988). Plaintiffs do not rely upon the second clause of § 1605(a)(2) which provides jurisdiction over "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere." 28 U.S.C. § 1605(a)(2), clause 2. Clause two reaches only those acts in the United States "which in and of themselves are sufficient to form the basis of a cause of action." H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 19, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6604, 6618 [hereinafter House Report]. *See also Maritime Int'l Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094, 1104 n.16 (1982) (holding that a breach-of-contract claim could not be maintained under clause two unless the breach took place in the U.S.), *cert. denied*, 464 U.S. 815 (1983).

"substantial contact", Respondents' claims were not "based upon" that commercial activity as required by the FSIA. The court held that the statutory requirement that an action be "based upon" a foreign sovereign's commercial activity requires a "nexus" between the claims alleged in the complaint and the commercial activity in the United States. *Id.* at 8, App. at 24a. The court reasoned that although there might have been a nexus between the commercial acts in the United States and the complaint "if [Respondent] had alleged some type of commercial cause of action arising from the employment contract," this was not the case: the "gravamen of [Respondent's] complaint . . . is an action for personal injuries." *Id.* The court found that the only "nexus" was "but for his recruitment in the United States, [Respondent] would not have taken the job, been arrested, and suffered the personal injuries" — a connection "far too tenuous to support jurisdiction over a foreign sovereign." *Id.*

Similarly, the district court found that Respondent's claim for negligent failure to warn was not sufficiently connected to Petitioners' commercial acts in this country. The court noted that Respondent had not alleged that the recruitment activities were undertaken "for the purpose of imprisoning and torturing U.S. citizens." *Id.* at 9, App. at 25a.

The parties did not dispute that Royspec's commercial activity, purchasing equipment and medical supplies, has "substantial contact with the United States." *Id.* at 4, App. at 21a. The district court found, however, that "[t]he only connection between Royspec and [Respondent] is that [Respondent] was given Royspec's phone number in Maryland as a way for his family to contact him in the event of an emergency." *Id.* at 7, App. at 23a. The court, therefore, concluded that there was "absolutely no nexus between Royspec's business and the torts alleged in Nelson's complaint." *Id.* at 7-8, App. at 23a-24a.

The Court of Appeals for the Eleventh Circuit reversed. *Nelson v. Saudi Arabia*, 923 F.2d 1528 (11th Cir. 1991), App. at 17a. It held that the commercial activity exception confers jurisdiction over all the Petitioners for all of Respondents' claims. The court rejected Petitioners' contention that the FSIA precludes jurisdiction over these claims because they arose from core governmental conduct, the exercise of a sovereign's police power within its own borders. The Eleventh Circuit reasoned that "when there is a 'jurisdictional nexus' between the acts for which damages are sought, and the foreign sovereign's commercial activity, then the claim is 'based upon' commercial activity." *Id.* at 1534, App. at 12a. The court then held that the arrest and imprisonment of Respondent — the acts for which damages are sought — amounted to commercial activity because that conduct "resulted from and [was] directly attributable to [Respondent's] employment." *Id.* at 1535, App. at 16a. The court supported this conclusion by noting that either Respondent was arrested for performing his duties as monitoring systems engineer as he alleges, or else he was arrested for submitting a false diploma as Petitioners allege. *Id.* at 1535-36, App. at 16a.

The Eleventh Circuit also found that the connection between the gravamen of Respondents' complaint — allegations of wrongful arrest and imprisonment — and Petitioners' commercial activity in the United States was sufficient to justify the assertion of jurisdiction under the commercial activity exception. The court found that the recruitment and hiring of Respondent constituted the necessary commercial activity in the United States because it "was part of a process having 'substantial contact with the United States.'" *Id.* at 1533, App. at 11a. The court then held that "the detention and torture of [Respondent] are so intertwined with his employment at the Hospital that they are 'based upon' his recruitment and hiring, in the United States." *Id.* at 1535, App. at 15a.

Having found a sufficient connection to justify the assertion of jurisdiction in the United States over Petitioners Saudi Arabia and the Hospital, the court turned to the allegations against Petitioner Royspec. It noted that Royspec "maintains an office in Maryland, and acts as the purchasing agent for the Hospital, in the United States." *Id.* at 1536, App. at 17a. It then found the necessary connection between that commercial activity in the United States and the claims in Respondent's receipt of the phone number of Royspec's Maryland office as an emergency number for his family. *Id.* The court, therefore, held that "Royspec is within the subject matter jurisdiction of the court." *Id.*

After the Eleventh Circuit entered judgment, Petitioners sought rehearing and suggested rehearing en banc. The United States filed a statement of interest in support of the petition for rehearing.[7] The petition was denied.[8]

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit's decision in this case marks the first time that any United States court has asserted jurisdiction over a foreign state on the basis of a tort allegedly committed in the exercise of the foreign sovereign's police power wholly within its own territory. This ruling is not only unprecedented, it is wrong. The Eleventh Circuit's expansion of the jurisdiction of the United States courts in this case conflicts with the decisions of other circuits, misinterprets the FSIA, and defeats

[7]The position of the United States is fully set forth in its Statement of Interest included in the Appendix hereto at 29a. In light of the United States' expressed interest in this case, it may be appropriate to solicit a response from the Solicitor General.

[8]The Eleventh Circuit's decision "does not purport to address the applicability of the act of state doctrine." Order Denying Petition for Rehearing and Suggestion of Rehearing En Banc, *Nelson v. Saudi Arabia*, 923 F.2d 1528 (11th Cir. 1991); App. at 27a.

congressional intent. Not only does the Eleventh Circuit's decision deprive Petitioners of the immunity that Congress intended, it also interjects United States courts into the arena of foreign affairs, potentially impeding the ability of the executive branch to conduct foreign relations. As the United States stated in its statement of interest in support of the petition for rehearing and suggestion of rehearing en banc, the Eleventh Circuit's decision "radically departs from established law and is at odds with Congress' intent." Statement of Interest of the United States in Support of Rehearing and Suggestion for Rehearing In Banc at 9, *Nelson v. Saudi Arabia*, 923 F.2d 1528 (11th Cir. 1991), App. at 42a [hereinafter Statement of Interest].

This Court should grant the petition for two reasons. First, the decision of the Eleventh Circuit conflicts with decisions of several other United States Courts of Appeals that have interpreted the FSIA. This conflict, unless resolved by this Court, will result in inconsistent treatment of foreign sovereigns before the courts of the United States.

Second, this Court has not yet addressed the significant questions of federal law involved in this case. The FSIA is an important federal statute, implicating not only the jurisdiction of United States courts, but the conduct of foreign relations as well. The issues presented in this case have "major foreign policy ramifications" for the United States because the FSIA "is the only means by which foreign states may be sued in United States courts." Statement of Interest at 1, 2, App. at 36a. Because the Eleventh Circuit's ruling in this case conflicts with the decisions of other circuits and because the Eleventh Circuit wrongly decided important federal questions, this Court should grant the petition.

I. THE DECISION OF THE ELEVENTH CIRCUIT SQUARELY CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS

United States Courts of Appeals have interpreted the commercial activity exception of the FSIA to establish two fundamental prerequisites to the exercise of subject-matter jurisdiction over disputes involving a foreign state. First, the conduct of the foreign state forming the basis of the complaint must be commercial in nature; a court cannot adjudicate claims arising from sovereign conduct, regardless of their relationship to commercial activity. Second, when a claim arises from the commercial conduct of a foreign state outside the United States, that conduct must be sufficiently related to the commercial activity of the foreign state in the United States to justify haling the foreign state into a United States court. The Eleventh Circuit's holding in this case conflicts with the decisions of other circuits on both critical points.

In this case, the Eleventh Circuit held for the first time that the FSIA requires a foreign state to submit to the jurisdiction of a United States court over claims arising from purely sovereign conduct — the arrest and imprisonment by Saudi law enforcement officials of a foreign resident alien — if that conduct can be even remotely connected to commercial activity. The Eleventh Circuit also held that the FSIA permits the exercise of jurisdiction over claims arising from the conduct of a foreign state outside the United States, even if those claims have no legally relevant relationship to the foreign state's conduct in the United States; as, for example, in this case where the recruitment of Respondent in the United States is legally irrelevant to his claims of wrongful arrest and imprisonment in Saudi Arabia. Because these holdings establish jurisdictional standards directly in conflict with the standards established by other circuits, this Court should grant certiorari to resolve the dispute.

A. The Eleventh Circuit's Holding That the Exercise of the Police Power in a Foreign State Can Be Considered Commercial Activity For Purposes of the FSIA Directly Conflicts With Decisions of the Second, Fifth, Ninth, and District of Columbia Circuits

The Eleventh Circuit held that the commercial activity exception of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2) (1988), abrogates the immunity of a foreign state from claims arising out of core sovereign conduct, such as law enforcement activities, when that conduct has a "jurisdictional nexus" with the foreign sovereign's commercial conduct. The court held, "[A] claim is 'based upon' the commercial activity of a foreign state when there is a 'jurisdictional nexus' between the acts for which damages are sought, and the foreign sovereign's commercial activity." *Nelson*, 923 F.2d at 1534, App. at 12a. This holding marks an unprecedented expansion of the jurisdiction of the federal courts. It also conflicts directly with the holdings of four other circuits.

The Ninth Circuit held in *Gregorian v. Izvestia*, 871 F.2d 1515 (9th Cir.), *cert. denied*, ____ U.S. ____, 110 S. Ct. 237 (1989), that the commercial activity exception does not confer jurisdiction over claims arising from the sovereign conduct of a foreign state, even when that conduct is allegedly tied to commercial activity. In *Gregorian*, an American businessman alleged that *Izvestia*, an official publication of the Soviet Union, had libelled him as part of a civil conspiracy with other Soviet government defendants to avoid contractual obligations to the plaintiff's company. *Id.* at 1517. The plaintiff contended that the commercial activity exception conferred jurisdiction over the libel claim against *Izvestia* because *Izvestia* had published the allegedly libelous article " 'in connection with' a 'commercial activity' of the [other] Soviet defendants." *Id.* at 1521 (quoting Gregorian's complaint).

In rejecting the plaintiff's contention, the Ninth Circuit emphasized that the FSIA characterizes governmental activities by their nature, not their purpose. *Id.* (citing 28 U.S.C. § 1603(d) (1988)). Because *Izvestia*'s publication of the article was "clearly governmental" in nature, *id.*, the Ninth Circuit held that the district court had properly dismissed the libel claim for lack of subject-matter jurisdiction despite its connection to Soviet commercial activity in the United States. *Id.* at 1522. The Eleventh Circuit, by contrast, held that it could assert jurisdiction over Respondent's claims of wrongful arrest and imprisonment, despite the clearly governmental nature of Petitioners' exercise of its police power, because that conduct allegedly had the commercial purpose of punishing Respondent for employment-related acts. *Nelson*, 923 F.2d at 1535-36, App. at 16a.[9]

[9]While styled as claims for "wrongful arrest and imprisonment" and "inhuman torture", Respondents' causes of action are clearly predicated upon an alleged abuse of legal process and could have been styled as "malicious prosecution" or "abuse of process." *See Mundt v. United States*, 611 F.2d 1257, 1259 (9th Cir. 1980) ("[i]f the imprisonment is under legal process but the action has been carried on maliciously and without probable cause, it is malicious prosecution"); *Nesmith v. Alford*, 318 F.2d 110, 118 n.4 (5th Cir. 1963) ("[m]alicious prosecution is the groundless institution of criminal proceedings"), *cert. denied*, 375 U.S. 975 (1964). *See also McCarthy v. Kleindienst*, 741 F.2d 1406, 1414 (D.C. Cir. 1984) (misuse of legal process is the essence of the tort of abuse of process). Petitioners, therefore, argued on appeal that they were immune from Respondents' claims under 28 U.S.C. § 1605(a)(5)(B), which immunizes foreign states from claims of malicious prosecution or abuse of process. Although the Eleventh Circuit did not address this argument in its opinion, its decision in this case implicitly rejects the Ninth Circuit's holding in *Gregorian*, 871 F.2d at 1522 n.4, that Congress intended § 1605(a)(5)(B) to grant foreign states complete immunity from claims "arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights" regardless of any connection between the conduct forming the basis of those claims and the foreign state's commercial activity.

The D.C. Circuit has also expressly rejected the interpretation of the FSIA which the Eleventh Circuit adopted in this case. In *Millen Indus., Inc. v. Coordination Council for N. Am. Affairs*, 855 F.2d 879 (D.C. Cir. 1988), Millen alleged that an instrumentality of Taiwan induced it to construct and operate a factory in Taiwan by promising it duty-free treatment for its imports and " 'easy access through Taiwanese customs'." *Id.* at 880-81 (quoting Millen's complaint). After Taiwan cancelled duty-free treatment and otherwise obstructed Millen's operations, Millen sued the Taiwanese instrumentality, alleging breach of contract, misrepresentation and conversion. *Id.*

The D.C. Circuit held that the commercial activity exception did not confer jurisdiction over Millen's claims of misrepresentation based on changes in Taiwan's customs law. Though involving the commercial element of investment promotion, those claims arose from sovereign conduct — namely, the right to regulate international trade. *Id.* at 885. The court reasoned:

> [W]hen a transaction partakes of both commercial and sovereign elements, jurisdiction under the FSIA will turn on which element the cause of action is based on. Even if a transaction is partly commercial, jurisdiction will not obtain if the cause of action is based on a sovereign activity.

Id. The court also held that the commercial activity exception would confer jurisdiction over Millen's claim based on the defendant's representation of "easy access through Taiwanese customs" if Millen could demonstrate that this representation referred to "the commercial activity of a commercial 'customs expediter'" as opposed to "the essentially governmental activities of customs agents." *Id.* In opposition to the D.C. Circuit, the Eleventh Circuit held in *Nelson* that when

a cause of action partakes of both commercial and sovereign elements, jurisdiction will obtain as long as a jurisdictional nexus exists between the foreign state's sovereign conduct and its commercial activity. *Nelson*, 923 F.2d at 1534, App. at 12a.

The Fifth Circuit, in *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385 (5th Cir. 1985), has also dismissed the contention that the sovereign activity of a foreign state may be subjected to scrutiny in federal court by virtue of its connection with commercial activity. The *De Sanchez* court rejected the notion that the commercial activity exception conferred jurisdiction over plaintiff's claims against the central bank of Nicaragua for its failure to honor its own check. The central bank had issued the check, payable in United States dollars, as part of a sale of dollars to a private Nicaraguan bank which had insufficient foreign exchange to honor the plaintiff's demand on a certificate of deposit purchased from that bank. *Id.* at 1387-88.

In dismissing the claim for lack of subject-matter jurisdiction, the Fifth Circuit held that the central bank's issuance of the check was sovereign in nature and "imbued its later breach with sovereignty" because the central bank had issued the check as part of "its official role of regulating the sale of foreign exchange." *Id.* at 1393, 1394. In reaching this result, the court ignored the connection between the issuance of the check and the commercial activity of selling the certificate of deposit as well as the generally commercial character of sales of foreign currency. *Id.* at 1391-92. The Eleventh Circuit, by contrast, relied on the alleged connection between Petitioners' arrest and imprisonment of Respondent and his employment at the Hospital to justify the exercise of jurisdiction under the FSIA. *Nelson*, 923 F.2d at 1535, App. at 16a.

In *Letelier v. Republic of Chile*, 748 F.2d 790 (2d Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985), the Second Circuit reversed

a district court ruling that would have permitted execution to satisfy a tort judgment against LAN, Chile's national airlines, under a provision of the FSIA paralleling the commercial activity exception for subject-matter jurisdiction,[10] " 'so long as the assets on which the judgment creditor seeks to execute were also used commercially in the activity giving rise to the claim.' " *Id.* at 792 (quoting *Letelier v. Republic of Chile*, 567 F.Supp. 1490, 1499 (S.D.N.Y. 1983)). The plaintiffs in *Letelier* contended that they could execute a judgment against LAN because of its alleged complicity, through its commercial activity, in the assassination of plaintiffs' decedents. Rejecting this argument, the Second Circuit held that state-sponsored terrorism is sovereign conduct that does not fall within the commercial activity exception, regardless of its connection to commercial activity. 748 F.2d at 797-98. Thus, whereas the Second Circuit refused to apply the commercial activity exception to claims arising from state-sponsored terrorism, despite their connection to commercial activity, the Eleventh Circuit held that the FSIA confers jurisdiction over allegations of torture — defined in Respondents' complaint as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official" — because of their alleged connection to commercial activity.

In sum, the Eleventh Circuit stands alone in interpreting the FSIA to confer subject-matter jurisdiction over claims arising from the sovereign conduct of a foreign state when that conduct is connected with the foreign sovereign's commercial activity. Four circuits have held that in such circumstances, the complaint must be dismissed for lack of subject-matter jurisdiction. Only this Court can resolve this irreconcilable conflict among the circuits.

[10] "Congress specifically designed the execution immunity rules to 'conform' to the jurisdictional immunity provisions of § 1605." *Letelier*, 748 F.2d at 796 (citing House Report, *supra* note 1, at 7).

B. The Eleventh Circuit's Holding That Respondents' Claims Have Substantial Contact With the United States Directly Conflicts With the Decisions of Other Circuits

The commercial activity exception requires that an action be "based upon" the commercial activity of the foreign state in the United States. In this case, Respondent alleges that he was arrested and imprisoned because of his job performance. He performed his job entirely in Saudi Arabia. Nevertheless, the Eleventh Circuit found that the recruitment and hiring of Respondent in the United States — consisting only of HCA's advertisement for the position at the Hospital and Respondent's receiving the offer and executing the employment contract — constituted commercial activity in the United States within the meaning of the FSIA because it "was part of a process having 'substantial contact with the United States'." *Nelson*, 923 F.2d at 1533, App. at 11a. The court followed a two-step analysis to find that Respondent's claims were based upon commercial activity carried out in the United States: first, the gravamen of Respondent's complaint — the alleged wrongful arrest and torture by Saudi law enforcement officials — was "intertwined with his employment at the Hospital", *Id.* at 1535; second, the employment resulted from his recruitment and hiring in the United States. *Id.* Thus, by jumping through two hoops, the Eleventh Circuit has found jurisdiction in a case where the contact with the United States is not only attenuated, but legally irrelevant.

Under the Eleventh Circuit's apparent "double nexus" test, the link between a foreign sovereign's commercial activity in the United States and its activity outside the United States forming the basis of the complaint satisfies the substantial contact requirement even though the commercial activity in the United States was not part of the activity forming the gravamen of the complaint nor an element of the alleged causes

of action. The Eleventh Circuit's holding directly conflicts with the majority of circuits — the Second, Third, Fifth, Sixth and Ninth — that have adopted the "nexus test." It also conflicts with the minority of circuits — the Seventh and D.C. Circuits — that have adopted the "*Gilson* test."

Five circuits have adopted a "nexus test" to determine whether the link between the conduct of the foreign state forming the basis of the complaint and the foreign state's commercial activity in the United States satisfies the requirement that the commercial activity be "carried on in the United States." These circuits have stated the test variously as follows:

> (1) "[T]he first clause of § 1605(a)(2) . . . withdraws immunity with respect to . . . acts outside the United States if they comprise an integral part of the state's 'regular course of commercial conduct' . . . 'having substantial contact with the United States.' " *Barkanic v. General Admin. of Civil Aviation*, 822 F.2d 11, 13 (2d Cir.), *cert. denied*, 484 U.S. 964 (1987) (quoting *Ministry of Supply, Cairo v. Universe Tankships, Inc.*, 708 F.2d 80, 84 (2d Cir. 1983).
>
> (2) Plaintiff's claim is "based upon" a commercial activity carried on in the United States where there is "a nexus between [plaintiff's] grievance and [defendant's] 'commercial activity carried on in the United States.' " *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270, 272 (3rd Cir. 1980) (quoting 28 U.S.C. § 1605(a)(2)).
>
> (3) "[T]he commercial activity that provides the jurisdictional nexus with the United States must also be the activity on which the lawsuit is based." *Stena Rederi AB v. Comision de Contratos*, 923 F.2d 380, 387 (5th Cir. 1991).

> (4) "[T]he commercial activity [in the United States] relied upon by plaintiff for jurisdictional purposes must be also the activity upon which the lawsuit is based; that is, there must be a connection between that activity, and the act complained of in the lawsuit." *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 452 (6th Cir. 1988).
>
> (5) "There must be a nexus between the defendant's commercial activity in the United States and the plaintiff's grievance. The commercial activity relied upon by [plaintiff] to establish jurisdiction must be the activity upon which the lawsuit is based." *America West Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 796 (9th Cir. 1989) (citations omitted).

Each of these circuits, therefore, holds that a claim arising from a foreign sovereign's commercial activity outside the United States is "based upon" the foreign sovereign's commercial conduct within the United States only if the foreign sovereign's commercial activity within the United States is also the same activity on which the claim is based.

In the seminal "nexus test" case, *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270 (3rd Cir. 1980), the plaintiff alleged that Aeromexico, Mexico's national airline, had breached the common carrier's duty of care by delaying his return flight to the United States under intolerable conditions. The district court dismissed for lack of subject-matter jurisdiction. *Id.* at 272. Reversing, the Third Circuit found that the plaintiff's purchase of his roundtrip ticket in the United States and the occurrence of the alleged tort at the midpoint of that roundtrip supplied the required nexus to establish that the complaint was "based upon" Aeromexico's airline operations in the United States. *Id.*

While *Sugarman* exemplifies the quantum and type of contacts that will provide the required nexus, *America West*

Airlines, Inc. v. GPA Group, Ltd., 877 F.2d 793 (9th Cir. 1989), typifies the cases where the contacts between the foreign sovereign's commercial activity in the United States and the acts forming the basis of the complaint do not satisfy the nexus requirement. America West purchased an airplane whose engines had been overhauled by Airmotive, a wholly owned subsidiary of Ireland's national airlines, Aer Lingus. After the engine failed, caught fire, and was destroyed, America West sued Airmotive and Aerlinte, another wholly owned subsidiary of Aer Lingus, for negligence. *Id.* at 795. Although finding that Aerlinte's operation of a commercial airline constituted commercial activity in the United States by a foreign state, the Ninth Circuit held that this commercial activity did not confer subject-matter jurisdiction because America West's "claim [did] not in any way relate to *Aerlinte*'s commercial operations. The '*specific* acts that form the basis of the suit,' [were] the engine maintenance activities of Airmotive, which took place solely in Ireland." *Id.* at 797. (emphasis in original, footnote and citation omitted).

The Eleventh Circuit's "double nexus" test establishes a different legal threshold, allowing jurisdiction over claims that have a much looser connection with the United States than the connection required under the nexus test. The result in this case, therefore, would have been different had Respondent filed the complaint in one of the five circuits applying the nexus test. In any of those circuits, Respondent's claims would have been dismissed for lack of subject-matter jurisdiction.

The "*Gilson* test", first introduced in *Gilson v. Republic of Ireland*, 682 F.2d 1022 (D.C. Cir. 1982), requires a tighter fit between the commercial activity of a foreign state in the United States and the commercial activity forming the gravamen of the complaint than even the nexus test. The *Gilson* court explained that an action meets the "based upon" requirement of the commercial activity exception if the plain-

tiff can demonstrate "a direct causal connection" between the commercial activity in the United States and the acts forming the basis of the complaint or if the commercial activity in the United States "is an element of the cause of action under whatever law governs [the] claims." *Id.* at 1027 n.22. Although the *Gilson* case involved clause two of the commercial activity exception, the D.C. Circuit has also applied this standard in a case involving clause one. *See Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1514 (D.C. Cir. 1988).

Zedan involved a breach-of-contract claim against the Kingdom of Saudi Arabia. Zedan had received a telephone call in the United States recruiting him for work on a road construction project in Saudi Arabia. After Zedan had been on the job for five months, a new employer took over the project and signed Zedan to a five-year employment contract. When an agency of the Saudi government subsequently took over the project, it guaranteed payment under Zedan's employment contract. Zedan alleged that Saudi Arabia never paid the guaranteed salary. *Id.* at 1512. The D.C. Circuit rejected Zedan's contention that the recruitment call to the United States supplied the necessary link between the United States and the alleged breach of contract in Saudi Arabia. It reasoned that the link between the call and the guarantee was "too attenuated to constitute 'a direct causal connection.' " *Id.* at 1514. The court added,

> Under appellant's theory, our jurisdiction would extend to any and all disputes between Zedan and Saudi Arabia subsequent to the phone call, merely because but for that call Zedan would not have traveled to Saudi Arabia.

Id. As in *Zedan*, the link between Respondent's recruitment and hiring in the United States and his arrest and imprisonment in Saudi Arabia is "too attenuated to constitute 'a direct causal

connection,'" for otherwise "jurisdiction would extend to any and all disputes between [Respondent] and Saudi Arabia subsequent to" Respondent's recruitment. *Zedan*, 849 F.2d at 1514.

The Seventh Circuit recently applied the alternative prong of the "*Gilson* test" in *Santos v. Compagnie Nationale Air France*, 934 F.2d 890 (7th Cir. 1991).[11] There, the plaintiff, an employee of an American company, sued Air France for personal injuries resulting from the negligence of an Air France employee at a French airport. The plaintiff claimed that his cause of action was "based upon" Air France's commercial activity in the United States because he was working at the airport under a lease between Air France and his employer. *Id.* at 892. The Seventh Circuit rejected this argument, reasoning that the plaintiff did not claim any rights as a third-party beneficiary to the lease. *Id.* It then held that the plaintiff could not satisfy the "based upon" requirement of the commercial activity exception because "[n]one of the elements of [his] claim concern acts in the United States." *Id.* at 894.

Applying either prong of the *Gilson* test to the facts in this case would require dismissal of Respondents' complaint for lack of subject-matter jurisdiction. The Eleventh Circuit did not find "direct" causation. Indeed, even Respondent alleges only indirect causation. In essence, Respondent alleges that he was recruited in the United States to perform a job in Saudi Arabia. He then alleges that he was unlawfully arrested on the basis of his job performance in Saudi Arabia. Under

[11]The *Santos* court, citing the Eleventh Circuit's decision in *Nelson*, noted that the term "'based upon' requires an 'identifiable nexus' between the claim and the commercial activity at issue." *Santos*, 934 F.2d at 982. It then turned to the remaining question, "what level of 'nexus', 'bond', 'link', or 'connection', is necessary", and concluded "that a claim is 'based upon' events in the United States if those events establish a legal element of the claim." *Id.* at 893.

Respondent's own allegations, then, the job performance — not his recruitment — is the direct cause of his alleged injury. In finding sufficient contact with the United States, the Eleventh Circuit embraced a "but for" causation analysis: a jurisdictional test which, taken to its logical extreme, is virtually limitless.

Respondent also could not satisfy the alternative prong of the *Gilson* test. The Eleventh Circuit did not find — as it could not — that any element of Respondent's cause of action occurred in the United States. The incidental contact that Petitioners' recruitment and hiring of Respondent had with the United States is not an element of his claims for wrongful arrest and imprisonment. The Eleventh Circuit, therefore, has established a standard for the exercise of jurisdiction over foreign states that is far broader than, and squarely conflicts with, the governing standard in the Seventh and District of Columbia Circuits.

In sum, the Eleventh Circuit's decision in this case creates standards for the exercise of jurisdiction over foreign states in direct conflict with the standards applied in other circuits. Claims that would be dismissed in other circuits for lack of subject-matter jurisdiction can proceed in the Eleventh Circuit. If the decision in this case stands, any claim — even if based upon the inherently sovereign conduct of a foreign state — can be adjudicated in the Eleventh Circuit if the plaintiff merely alleges a connection to the foreign state's commercial activity. Thus, the Eleventh Circuit's decision permits jurisdiction over claims against a foreign state far more tenuously linked to the foreign state's commercial activity in the United States than the connection required in seven other circuits. As the United States asserted in its Statement of Interest, the opinion of the Eleventh Circuit is "inconsistent with many other circuit decisions which make clear that the commercial activity providing the jurisdictional nexus with the United States

must itself be the activity on which the lawsuit is based." Statement of Interest at 4, App. at 38a. Because these conflicting standards cannot be reconciled, this Court should grant certiorari to resolve the dispute.

II. THIS CASE PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW WHICH THIS COURT SHOULD RESOLVE

In the nearly fifteen years since the enactment of the FSIA, this Court has not addressed the proper interpretation of the commercial activity exception to foreign sovereign immunity, despite its status as the most frequently litigated FSIA exception. *See De Sanchez*, 770 F.2d at 1390. Apart from the need to resolve the conflict among the circuits, this Court should resolve the issues presented in this case for two additional reasons: first, the potential for inconsistent treatment of foreign sovereigns created by the Eleventh Circuit's decision defeats Congress's primary purpose in enacting the FSIA; second, the Eleventh Circuit's decision interferes with the conduct of foreign relations and has major foreign policy implications for the United States and all foreign states.

A. The Eleventh Circuit's Decision Defeats Congress's Intent in Enacting the FSIA

Congress had two principal purposes in enacting the FSIA: first, to codify the "restrictive" principle of sovereign immunity; second, to eliminate the prevailing inconsistency in sovereign immunity decisions resulting from the State Department's role in the decision-making process. The Eleventh Circuit's ruling and the resultant conflict among the circuits undermine both purposes.

Congress's paramount purpose in enacting the FSIA was to ensure that United States courts do not assert jurisdiction

over the sovereign acts of a foreign state. Congress achieved this end by codifying the "restrictive" principle of immunity in the FSIA. That principle restricts foreign sovereign immunity "to suits involving a foreign state's public acts." House Report, *supra* note 1, at 7. As a result, "[t]he determination of whether particular behavior is 'commercial' [or sovereign] is perhaps the most important decision a court faces." *Letelier*, 748 F.2d at 797.

The Eleventh Circuit's holding that Petitioners are required to defend in United States courts against allegations arising from the exercise of the sovereign police power contravenes Congress's primary purpose in enacting the FSIA by extending the jurisdiction of the federal courts to claims arising from the sovereign acts of a foreign state. As this Court has said, "If there is a present need to expand the jurisdiction of [the federal] courts . . . the Constitution specifically vests that power in the Congress, not in the courts." *Snyder v. Harris*, 394 U.S. 332, 341-42 (1969). The Eleventh Circuit's unilateral expansion of jurisdiction of United States courts is not only contrary to law, but of sufficient import to merit this Court's review.

Congress also enacted the FSIA to ensure that claims of foreign sovereign immunity are uniformly decided. Before the enactment of the FSIA, sovereign immunity determinations were made under "standards [that] were neither clear nor uniformly applied." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983). Congress intended to solve these problems by "transfer[ring] the determination of sovereign immunity from the executive branch to the judicial branch." House Report, *supra* note 1, at 7.

Contrary to Congress's intent, the Eleventh Circuit's decision will result in renewed inconsistency in determinations of

foreign sovereign immunity. These conflicting standards, at the least, confuse a foreign state subject to jurisdiction in one circuit, but not in another, for claims arising from similar conduct. Furthermore, by allowing a conflict among the circuits to persist, this Court would paradoxically permit FSIA decisions to revert to the pattern of inconsistency which Congress charged the judiciary to rectify.

Finally, this Court should grant review to establish clear standards that will guide the courts of the United States through a statutory framework that has alternatively been described as "labyrinthine", "remarkably obtuse", "twisted", and "a constant bane of the federal judiciary". *Stena Rederi AB v. Comision de Contratos*, 923 F.2d 380, 382 (5th Cir. 1991); *Vencedora Oceanica Navigacion v. Compagnie Nationale Algerienne de Navigation*, 730 F.2d 195, 205 (5th Cir. 1984) (Higginbotham, J., dissenting); *Gibbons v. Udaras na Gaeltachta*, 549 F.Supp. 1094, 1105, 1106 (S.D.N.Y. 1982). Indeed, permitting various interpretations of the FSIA to cohabitate among the circuits will only exacerbate the difficulties that the lower federal courts already face in applying the FSIA. This case, therefore, represents an appropriate opportunity for the Court to clarify the application of the commercial activity exception to foreign sovereign immunity.

B. This Case Implicates Important Foreign Relations Issues That Concern the United States and All Foreign States

The United States signified the importance of the issues in this case by filing a statement of interest in support of Petitioner's request for rehearing and suggestion for rehearing en banc. As the United States stated in its brief, this case involves "an important federal statute with major foreign policy ramifications." Statement of Interest at 1, App. at 35a. The

United States, of course, does not conduct foreign relations in a vacuum. The proper resolution of this case concerns the United States and all foreign sovereigns for two reasons.

First, as the United States said, if the police activities of foreign states can be scrutinized in United States courts, then the law enforcement conduct of the United States can be challenged in foreign tribunals, requiring American law enforcement officials to defend their conduct before foreign courts. *Id.* at 2, App. at 36a. Second, the United States could not claim immunity for its own law enforcement officials in foreign tribunals because, when sued in a foreign nation, the United States determines whether to raise the immunity defense based on the standards established under the FSIA.[12] *Id.* at 2-3 App. at 36a.

Although the United States addressed only law enforcement activity in its statement of interest, the Eleventh Circuit's holding is not so limited. It will touch on the full range of sovereign activity which may be the subject of litigation. As this Court said in ***Ex Parte Republic of Peru***, 318 U.S. 578, 588 (1943), "[C]ourts may not so exercise their jurisdiction . . . as to embarrass the executive arm of the government in conducting foreign relations." If not reversed, the Eleventh Circuit's decision in this case raises precisely that risk.

[12]Such suits against the United States do not pose a merely hypothetical concern. Indeed, claims similar to Respondents' have been filed against the United States in Unites States courts. In *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985), for example, plaintiffs brought an action against United States officials allegedly involved in "summary execution, murder, abduction, torture" and other violations of "international law" in Nicaragua. Holding that the United States had not waived its sovereign immunity for such claims, the court dismissed the claims on the ground of sovereign immunity. *Id.* at 207.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Scott NELSON and Vivian Nelson, Individually and as Husband/Wife, Plaintiffs-Appellants,

v.

SAUDI ARABIA, King Faisal Specialist Hospital, Royspec, Defendants-Appellees.

No. 89-5981.

United States Court of Appeals,
Eleventh Circuit.

Feb. 21, 1991.

Jorge A. Duarte, P.A., Miami, Fla. and Anthony D'Amato, Northwestern University School of Law, Chicago, Ill, for plaintiffs-appellants.

Maureen E. Mahoney, Latham & Watkins, Washington, D.C., for Saudi Arabia.

Marc Cooper, Cooper, Wolfe & Bolotin, P.A., Miami, Fla., for King Faisal Hosp. and Saudi Arabia.

Appeal from the United States District Court for the Southern District of Florida.

Before EDMONDSON and BIRCH, Circuit Judges, and RE*, Chief Judge.

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*Honorable Edward D. Re, Chief Judge of the United States Court of International Trade, sitting by designation.

RE, Chief Judge:

Plaintiffs-appellants, Scott and Vivian Nelson, appeal from a judgment of the United States District Court for the Southern District of Florida, dismissing their claim against defendants-appellees, Saudi Arabia, King Faisal Specialist Hospital, and Royspec, for lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act of 1976.

Scott Nelson was hired, in the United States, as a monitoring systems engineer for the King Faisal Specialist Hospital (the Hospital) in Riyadh, Saudi Arabia. Nelson alleged that, in the course of performing his duties under his employment contract with the Hospital, he was detained and tortured by agents of the Saudi government in Saudi Arabia in retaliation for reporting safety violations at the Hospital.

Nelson brought suit for his injuries against Saudi Arabia, the Hospital, and Royspec, a corporation owned and controlled by the government of Saudi Arabia (collectively Saudi Arabia). Nelson alleged subject matter jurisdiction under the Foreign Sovereign Immunities Act of 1976 (the FSIA). The district court concluded that Nelson's claims were not based upon the commercial activities of Saudi Arabia carried on in the United States, as required by the FSIA, and granted Saudi Arabia's motion to dismiss for lack of subject matter jurisdiction.

On appeal, Nelson contends that the district court erred in granting Saudi Arabia's motion to dismiss. Nelson asserts that, since his detention and torture were based upon his recruitment and hiring in the United States by an agent of the Saudi government, the district court has subject matter jurisdiction under the FSIA.

The question presented is whether the district court erred in determining that it does not have subject matter jurisdiction under the FSIA. More specifically, did the court have

jurisdiction in this action for damages for the detention and torture of Nelson by agents of the Saudi government, in Saudi Arabia, in retaliation for Nelson's conduct during his employment in Saudi Arabia in a position for which he was recruited and hired in the United States by an agent of the Saudi government.

Since we conclude that Nelson's detention and torture were based upon the recruitment and hiring of Nelson in the United States by an agent of the Saudi government, and that the recruitment and hiring was a commercial activity of Saudi Arabia, we hold that the district court has subject matter jurisdiction under the FSIA. Accordingly, we reverse the judgment of the district court.

BACKGROUND

In 1983, Scott Nelson, while in the United States, saw a printed advertisement recruiting employees for the King Faisal Specialist Hospital (the Hospital), in Riyadh, Saudi Arabia. The recruitment was conducted by the Hospital Corporation of America (HCA), an independent corporation which, in 1973, had contracted with the Royal Cabinet of the Kingdom of Saudi Arabia to recruit employees for the hospital.

After submitting an application, Nelson was interviewed in Saudi Arabia by two officials of the Hospital. Subsequently, he returned to the United States, and entered into a contract of employment with the Hospital as a monitoring systems engineer. The contract was signed in Miami, Florida, in November, 1983.

Nelson commenced employment at the Hospital on December 7, 1983. As stated in the Hospital's job description for monitoring systems engineer, Nelson was "[r]esponsible for the development and expansion of electronic monitor-

ing and control systems capabilities." He was also responsible for recommending "modifications of existing equipment and the purchase and installation of new equipment."

Nelson alleges that, on March 20, 1984, in the course of his duties at the Hospital, he discovered certain safety hazards, and reported these safety hazards to an investigative commission of the Saudi government. Nelson states that, on September 27, 1984, he was summoned to the Hospital's security office by agents or employees of the Hospital. He alleges that, from the security office, he was moved to a jail cell where he was "shackled, tortured and beaten" by agents or employees of the Saudi government. Nelson states that he was imprisoned for 39 days, during which time he was never informed of any charges against him, nor was he ever accused of a crime. He further states that his wife was told by a Saudi government official that he could be released if she provided sexual favors.

Nelson and his wife, Vivian Nelson, sued Saudi Arabia, the Hospital, and Royspec, a corporation owned and controlled by the Saudi government which acts as a purchasing agent for the Hospital. Nelson sought compensatory and punitive damages under 16 counts, and asserted that the district court had subject matter jurisdiction under the Foreign Sovereign Immunities Act of 1976, codified at 28 U.S.C. §§ 1602-1611. Saudi Arabia moved for dismissal for lack of subject matter jurisdiction.

The district court concluded that "the link between the recruitment activities and the Defendants is not sufficient to establish 'substantial contact' with the United States," within the meaning of 28 U.S.C. § 1603(e). *Nelson v. Saudi Arabia*, No. 88-1791, slip op. at 5 (S.D.Fla. Aug. 11, 1989). The district court also noted that "even if the court had determined that [the Hospital] and Saudi Arabia had carried on commercial activities having substantial contact with the United

States through the indirect recruitment activities, the court would be unable to find a nexus between those activities and Nelson's complaint." *Id.* at 8. Accordingly, the district court granted Saudi Arabia's motion to dismiss for lack of subject matter jurisdiction, thereby dismissing the action against all defendants.

DISCUSSISON

In *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 136, 3 L.Ed. 287 (1812), the Supreme Court adopted the common law doctrine of foreign sovereign immunity. As noted in *The Schooner Exchange*, the doctrine of foreign sovereign immunity rests on principles of comity between nations. *See id.* 135-36. *See also Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486, 103 S.Ct. 1962, 1967, 76 L.Ed.2d 81 (1983).

On the question of foreign sovereign immunity, the Supreme Court has generally deferred to the decisions or recommendations of the Executive Branch of government. *See id.; Ex Parte Republic of Peru*, 318 U.S. 578, 586-90, 63 S.Ct. 793, 799-800, 87 L.Ed. 1014 (1943) (discussing reasons for deferring to Executive Branch). Consequently, "[f]or more than a century and a half, the United States generally granted foreign sovereigns complete immunity from suit in the courts of this country." *Verlinden*, 461 U.S. at 486, 103 S.Ct. at 1967.

The doctrine of foreign sovereign immunity is closely related to the act of state doctrine. As articulated in *Underhill v. Hernandez*, 168 U.S. 250, 18 S.Ct. 83, 42 L.Ed. 456 (1897), under the act of state doctrine:

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the

> acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

Id. at 252, 18 S.Ct. at 84. *See also Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 691 n. 7, 96 S.Ct. 1854, 1859 n. 7, 48 L.Ed.2d 301 (1976).

Neither the doctrine of foreign sovereign immunity nor the act of state doctrine are as widely applied now as in the past. Indeed, it was suggested years ago that the act of state doctrine had "earned a well-deserved rest." E. Re, *Foreign Confiscations in Anglo-American Law* 170 (1951). *See also* Cardozo, *International Law in the New York Courts—1953*, 40 Cornell L.Q. 97, 109 (1955) ("the urge to grant sovereign immunity has also lost much of its force"). Surely, "the mere assertion of sovereignty as a defense to a claim arising out of purely commercial acts by a foreign sovereign is no more effective if given the label 'Act of State' than if it is given the label 'sovereign immunity.' " *Alfred Dunhill*, 425 U.S. at 705, 96 S.Ct. at 1866.

The present restrictive attitude in the application of the act of state doctrine is reflected in Justice Scalia's opinion in *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, ____ U.S. ____, 110 S.Ct. 701, 107 L.Ed.2d 816 (1990). In *Kirkpatrick* the plaintiff, an American corporation that unsuccessfully bid on a public works contract in Nigeria, sued the defendant, an American corporation that was the successful bidder on the contract. The plaintiff brought suit for damages, and contended that the defendant, which had pled guilty to violations of the Foreign Corrupt Practices Act of 1977, had paid bribes to Nigerian officials in order to obtain the contract. *See id.* 110 S.Ct. at 702-03. The defendant moved to dismiss,

contending that the suit was barred by the act of state doctrine. The district court granted the motion to dismiss. The Court of Appeals for the Third Circuit, however, reversed, and the Supreme court granted the defendant's writ of certiorari. *See id.* at 703-04.

In *Kirkpatrick*, the Supreme Court noted that, in prior opinions, several Justices had suggested an exception to the act of state doctrine for commercial transactions. *See id.* at 704 (citing *Alfred Dunhill*, 425 U.S. at 695-706, 96 S.Ct. at 1861-1867 (opinion of White, J.)). The Court stated that, apart from any exceptions, the act of state doctrine does not apply in *Kirkpatrick*, since "[n]othing in the present suit requires the court to declare invalid, and thus ineffective as 'a rule of decision for the courts of this country', the official act of a foreign sovereign." *Id.* (quoting *Ricaud v. American Metal Co.*, 246 U.S. 304, 310, 38 S.Ct. 312, 314, 62 L.Ed. 733 (1918)).

The present application of the doctrine of foreign sovereign immunity was significantly influenced by the shift or change in United States policy announced in the May 19, 1952 letter from the Acting Legal Adviser of the Department of State to the Acting Attorney General. After referring to the classical or "absolute" theory of sovereign immunity, the letter stated that " 'it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.' " 26 Dep't St.Bull. 984, 985 (1952) (quoting Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney General Phillip B. Perlman (May 19, 1952)).

The restrictive theory of sovereign immunity which was embraced by the 1952 policy grants immunity to a foreign sovereign only for acts characterized as "public" and not as

to those deemed "private." According to the modern theory, a state may be held liable in the courts of another nation if "it engages in an industrial, commercial, financial or other business enterprise in which private persons may there engage, or does an act there in connection with such an enterprise wherever conducted, and the proceeding is based upon the conduct of such enterprise or upon such act." Article 11, Draft Convention on Competence of Courts in Regard to Foreign States, *quoted in* Re, *Judicial Developments in Sovereign Immunity and Foreign Confiscations*, 1 N.Y.L.Forum 160, 167 (1955).

In the Restatement, it is stated that under the act of state doctrine the courts of the United States "will generally refrain from . . . sitting in judgment on other acts of a governmental character done by a foreign state within its own territory and applicable there." Restatement (Third) of Foreign Relations § 443(1) (1987). It has been noted, however, that the effect of the Restatement "has been to present the act of state doctrine as broader in scope, more general in application, more preclusive of international law, and less susceptible of limitation than is warranted by governing authority." Leigh, *Sabbatino's Silver Anniversary and the Restatement: No Cause for Celebration*, 24 Int'l Law. 1, 13-14 (1990). *See also* Olmstead, *Special Review Essays: The Restatement (Third) of the Foreign Relations Law of the United States—Jurisdiction*, 14 Yale J. Int'l L. 468, 481-82 (1989).

In 1976, Congress enacted the Foreign Sovereign Immunities Act (the FSIA). *See* 28 U.S.C. §§ 1602-1611 (1988). As noted by Professor Hans Smit, the FSIA represented "an attempt at comprehensive statutory regulation of jurisdictional immunities of foreign states and their agencies and instrumentalities." Smit, *The Foreign Sovereign Immunities Act of 1976: A Plea For Drastic Surgery*, *reprinted in* American Society of

International Law, Proceedings of the 74th Annual Meeting 49, 49 (1980).

According to the Report of the Judiciary Commitee of the House of Representatives, the FSIA was enacted "to provide when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States and to provide when a foreign state is entitled to sovereign immunity." H.R.Rep. No. 1487, 94th Cong., 2d Sess. 6, *reprinted in* 1976 U.S.Code Cong. & Admin.News 6604, 6604. The House Report also notes that the FSIA was intended to codify the principle of international law that a sovereign state is entitled to immunity only for *jure imperii*, its public acts, but not for *jure gestionis*, its commercial or private acts. *See id.* at 7, 1976 U.S.Code Cong. & Admin.News at 6605.

The FSIA provides that:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States. . . .

28 U.S.C. § 1605(a)(2) (1988). Under the FSIA, a "commercial activity carried on in the United States by a foreign state" is defined as a "commercial activity carried on by such state and having substantial contact with the United States." 28 U.S.C. § 1603(e) (1988).

In this case, Nelson contends that the district court has sub-

ject matter jurisdiction under the first clause of section 1605(a)(2), since "the action is based upon a commercial activity carried on in the United States by the foreign state. . . ." More specifically, Nelson states that "[t]he arbitrary prolonged detention and the physical torture of Mr. Nelson . . . is based directly upon the recruitment activity carried on in the United States by agents of Saudi Arabia."

In order to conclude that there is subject matter jurisdiction under the first clause of section 1605(a)(2), the court must find that Saudi Arabia's recruitment and hiring of Nelson, in the United States, was a "commercial activity," within the meaning of the FSIA. The FSIA provides that "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d) (1988). *See also De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1391 (5th Cir.1985).

Citing *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511 (D.C.Cir.1988), Saudi Arabia asserts that the mere recruitment of an employee in the United States is an insufficient contact on which to base subject matter jurisdiction under the FSIA. In *Zedan*, the plaintifff, while in the United States, received a phone call recruiting him to work on a project in Saudi Arabia for a company which was not an agency of the Saudi government. *See id.* at 1512. After the plaintiff had worked on the project for two different companies for approximately three years, the project was taken over by an agency of the Saudi government. Several months later, after completing his employment but without receiving total payment, the plaintiff returned to the United States. The plaintiff then sued Saudi Arabia, seeking money due him under his contract of employment. The district court granted Saudi Arabia's motion to dismiss. *See id.*

On appeal, the Court of Appeals for the District of Columbia Circuit agreed that the district court lacked subject matter jurisdiction, and affirmed. In its jurisdictional analysis under the first clause of section 1605(a)(2), the court stated that the phone call recruiting the plaintiff was merely a "preliminary step" or a "precursor" to a commercial transaction. *See id.* at 1513. Hence, the court concluded that "[t]he link between a recruitment phone call in [the United States] and the [intervention of the Saudi government] two-and-one-half years and two employers later is, in our view, too attenuated to constitute a 'direct causal connection.' " *Id.* at 1514.

[1] In the present case, however, it is clear from the record that the recruitment and hiring of Nelson, in the United States, was part of a process having "substantial contact with the United States." The recruitment was conducted by the Hospital Corporation of America (HCA), which in 1973 contracted with the Royal Cabinet of the Kingdom of Saudi Arabia to recruit employees for the Hospital. HCA, a corporation organized under the laws of the Grand Cayman Islands, is the wholly owned subsidiary of an American corporation. The contract created an agency relationship between HCA and Saudi Arabia. Under the contract, HCA was empowered to "recruit and employ administrative, nursing, technical, maintenance and all other personnel with full authority to initially set and subsequently adjust their salaries and other remuneration, to supervise such employees, and in its sole judgment, to terminate the employment of any such personnel." In addition, the contract expressly provides that all "employment contracts will be between [Saudi Arabia] and the employee, but may be executed for [Saudi Arabia] by HCA as agent." The contract also states that "[a]ll expatriate personnel recruited must be acceptable to [Saudi Arabia] which acceptability shall be evidenced by issuance of an entrance visa."

On the facts presented we agree with Nelson that the recruitment and hiring in the United States constituted a "commercial activity" of Saudi Arabia, within the meaning of the FSIA. Nevertheless, in order to establish subject matter jurisdiction under the FSIA, the court must also conclude that the detention and torture of Nelson, in Saudi Arabia, were "based upon" Nelson's recruitment and hiring in the United States.

[2] Judicial authority reveals that a claim is "based upon" the commercial activity of a foreign state when there is a "jurisdictional nexus" between the acts for which damages are sought, and the foreign sovereign's commercial activity.

For example, in *Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation*, 730 F.2d 195 (5th Cir.1984), the plaintiff, the owner of a vessel, sued the defendants, an agent of the Algerian government and the Republic of Algeria, to recover for the loss of the vessel. The district court granted the defendant's motion to dismiss. On appeal, the plaintiff asserted subject matter jurisdiction under the first clause of section 1605(a)(2). *See id.* at 199.

The court in *Vencedora* noted that the courts had varying interpretations of the jurisdictional reach of the first clause of section 1605(a)(2). *See id.* at 199-200. After reviewing four different formulations of the jurisdictional scope of the first clause of section 1605(a)(2), the court adopted the nexus approach. Under the nexus view or requirement, there is subject matter jurisdiction if there is a "nexus" between the acts giving rise to liability, and the commercial activity carried on by the foreign state in the United States. *See id.* at 202. *See also De Sanchez*, 770 F.2d at 1391 (subject matter jurisdiction under section 1605(a)(2) requires a "jurisdictional nexus with the United States").

In addition, the Court of Appeals for the Ninth Circuit has held that there is subject matter jurisdiction under the first clause of section 1605(a)(2) if there is "a nexus between the defendant's commercial activity in the United States and the plaintiff's grievance." *America West Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 796 (9th Cir.1989). Similarly, the Court of Appeals for the Third Circuit has stated that "[i]t is essential that there be a nexus between the plaintiffs' grievance and the sovereign's commercial activity." *Velidor v. L/P/G Benghazi*, 653 F.2d 812, 820 (3d Cir.1981). *Cf. Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 452 (6th Cir.1988) (subject matter jurisdiction under section 1605(a)(2) requires "a connection" between the commercial activity and the act complained of in the suit).

[3] This jurisdictional nexus requirement between the act complained of or grievance, and the commercial activity or business enterprise conducted by the foreign state is salutary and necessary to satisfy both the congressional policy of the FSIA and sound principles of comity. The nexus requirement implies a bond or link that connects the foreign state to the wrongful act for which it is sought to be held liable. It is comparable to the requirement that there be a causal connection in order to impose liability in the civil law of torts. The jurisdictional nexus requirement of the FSIA finds a domestic parallel in the requirement of a nexus in the application of long-arm statutes. *See, e.g., American Express Int'l, Inc. v. Mendez-Capellan*, 889 F.2d 1175, 1178-79 (1st Cir.1989).

Saudi Arabia contends that the district court lacks subject matter jurisdiction under the FSIA since Nelson's claims "are based upon the governmental exercise of police power in a foreign country." Saudi Arabia asserts that "[t]he claims are based upon the acts of the Saudi police and prison officials—'governmental' acts beyond the reach of the commercial activity exception."

In support of its contention, Saudi Arabia cites *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371 (5th Cir.1980). In *Arango*, the plaintiffs contended that they suffered injuries when their vacation tour, which was sponsored in part by the defendant, the national airline of the Dominican Republic, was terminated. The plaintiffs asserted that, because their names were on a list of undesirable aliens, upon their arrival in the Dominican Republic immigration officials denied them entry into the country, "man-handled" them, and "involuntarily rerouted" them to the United States. *See id.* at 1373. The plaintiffs sought damages under breach of contract and several tort claims, including false imprisonment and battery. The district court granted the defendant's motion to dismiss on all claims. *See id.* at 1374.

The Court of Appeals for the Fifth Circuit dismissed the appeal because, under Rule 54(b) of the Federal Rules of Civil Procedure, the order granting the defendant's motion to dismiss was not a final order. *See id.* at 1377-78. Notwithstanding its dismissal of the appeal on separate procedural grounds, the court of appeals discussed the applicable substantive law, and, "in the interest of expediency, proceed[ed] to offer [the district] court some guidance in its further handling of these issues." *Id.* at 1378. The court considered whether there was subject matter jurisdiction, under the first clause of section 1605(a)(2), for the claims of false imprisonment and battery. The court stated that in "man-handling" the plaintiffs during the denial of their entry into the country, the defendant "acted merely as an arm or agent of the Dominican government in carrying out this assigned role, and, as such, is entitled to the same immunity from any liability arising from that governmental function as would inure to the government, itself." *Id.* at 1379. The court, however, concluded that the defendant's actions which gave rise to the claims for breach of warranty and breach of contract were connected to the defendant's commercial activity. Hence, the district court would have had subject matter jurisdiction over these claims under section 1605(a)(2) of the FSIA. *See id.* at 1379-80.

Saudi Arabia also cites *Gregorian v. Izvestia*, 871 F.2d 1515, 1521-22 (9th Cir.), *cert. denied*, ____ U.S. ____, 110 S.Ct. 237, 107 L.Ed.2d 188 (1989). In *Gregorian*, the plaintiffs brought suit against the defendant *Izvestia*, a newspaper of the Soviet government, contending that they were libelled by an article published in *Izvestia* which, according to the plaintiff, was written and published so that agencies of the Soviet government could "avoid contractual obligations to plaintiffs resulting from alleged promises to pay for medical equipment transported to the Soviet Union by plaintiffs." *Id.* at 1516. The plaintiffs contended that the libel was a "commercial activity," within the meaning of the FSIA, since it "was published with the *purpose* of injuring plaintiffs by avoiding commercial obligations." *Id.* at 1521 (emphasis in original). The court noted that, under the FSIA, the court must look to the "nature" of the activity at issue, rather than its purpose. *See id.* (citing 28 U.S.C. § 1603(d)). The court found that because *Izvestia* articles are " 'official commentary of the Soviet government,' " publishing and writing them " 'constitutes an activity whose essential nature is public or governmental.' " *Id.* (quoting *Yessenin-Volpin v. Novosti Press Agency*, 443 F.Supp. 849, 856 (S.D.N.Y.1978)). Hence, the libel claim was dismissed for lack of subject matter jurisdiction under section 1605(a)(2). *See id.* at 1522.

[4] In the case of Nelson, however, we find that the detention and torture of Nelson are so intertwined with his employment at the Hospital that they are "based upon" his recruitment and hiring, in the United States, for employment at the Hospital in Saudi Arabia. In his complaint, Nelson alleged that, in the course of his duties, he discovered safety hazards at the Hospital and that he reported these hazards to an in-

vestigative body of the Saudi government. Nelson further asserted that as a result of those actions, "[h]e was summoned . . . by agents or employees of [the Hospital] to the [H]ospital's security office from which he was transported to a jail cell, shackled, tortured and beaten by agents or employees of SAUDI ARABIA. . . ."

Unlike the facts in *Arango*, in this case the actions of Saudi Arabia resulted from and were directly attributable to Nelson's employment. Furthermore, the Hospital's job description for monitoring systems engineer, the specific position for which Nelson was recruited and hired in the United States, including recommending modifications to existing equipment. The Hospital's job description also states that a monitoring systems engineer "[a]ssures compliance with safety regulations[,]" and "[t]roubleshoots problems and implements corrective action." Hence, detecting and reporting safety violations at the Hospital was a required employment duty for the position for which Nelson was recruited and hired in the United States.

Saudi Arabia, however, asserts that the actions taken against Nelson were the result of Nelson's submission of a false diploma from the Massachusetts Institute of Technology in his application for employment. In making this argument, Saudi Arabia in effect admits the nexus between Nelson's recruitment in Florida and his detention and torture in Saudi Arabia, and supports Nelson's claim of subject matter jurisdiction.

There is also a separate question as to whether the district court properly dismissed Nelson's claim against Royspec. Nelson asserts that Royspec, an instrumentality of the Saudi government, is within the subject matter jurisdiction of the court, under the FSIA, since it "was directly involved in the recruitment of Mr. Nelson."

[5] It is undisputed that Royspec, derived from Royal Specialist Purchasing Services, was founded by the Hospital

in 1979. It is also undisputed that Royspec maintains an office in Maryland, and acts as the purchasing agent for the Hospital, in the United States. Furthermore, Nelson was given the phone number of Royspec's Maryland offie so that his family could contact him, while he was in Saudi Arabia, in the event of an emergency. We also note that four telegrams, all of which acknowledge Nelson's employment, contain the telex designation "ROSPEC," which, according to Nelson, may be the designation for Royspec. Although Saudi Arabia denies that the designation "ROSPEC" represents Royspec, on the record before the court and under the FSIA, we conclude that Royspec is within the subject matter jurisdiction of the court.

Finally, our holding is not based upon the act of state doctrine but on the interpretation and application of the FSIA. On the facts presented we hold that the district court erred in determining that it did not have subject matter jurisdiction.

CONCLUSION

Since we conclude that, on the facts presented, the recruitment and hiring of Nelson in the United States was a "commercial activity" of the Saudi government, and that Nelson's subsequent detention and torture were "based upon" Nelson's recruitment and hiring in the United States, the district court erred in determining that there was no subject matter jurisdiction under the FSIA. Accordingly, we REVERSE the judgment of the district court, and REMAND the case.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 88-1791-Civ-NESBITT

SCOTT NELSON and
VIVIAN NELSON,

Plaintiffs,

vs.

SAUDI ARABIA, KING FAISAL SPECIALIST HOSPITAL, and ROYSPEC,

Defendants.

FILED BY D.C.
AUG 11 1989
ROBERT M. MARCH
CLERK,U.S. DIST. CT.
S.D. OF FLA. MIAMI

MEMORANDUM OPINION

This cause is before the court on Defendants' motions to dismiss for lack of subject-matter jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 - 1611.

Facts

King Faisal Specialist Hospital ("KSFH"), located in Riyadh, Saudi Arabia, is owned and controlled by the Saudi government. Royspec (short for "Royal Specialists"), a separate corporate entity also owned and controlled by the Saudi government, is KFSH's purchasing agent. Royspec maintains an office in Maryland, and purchases hospital supplies and equipment in the United States. Until 1979, a U.S. corporation performed both purchasing and employee recruitment functions for KFSH in the United States, but in that year, the Saudi government created Royspec as purchasing agent for KFSH.

Plaintiff Scott Nelson was hired as Monitoring Systems Engineer at KFSH after being recruited for the position by

Hospital Corporation of America ("HCA") or an affiliated company. After a job interview in Saudi Arabia, Nelson returned to the United States, and in November 1983, while in Miami, signed an employment contract with KFSH. Nelson began his job in Riyadh the following month after attending orientation sessions conducted by HCA or an affiliated company in Tennessee.

As set forth in his job description, Nelson was responsible for assuring compliance with safety regulations, as well as for coordinating all technical activities and recommending modifications of the hospital's equipment. Nelson alleges that he repeatedly reported safety violations to a government commission and in retaliation, government agents unlawfully arrested him.[1] He further alleges that he was held against his will for 39 days, during which time he was interrogated, shackled, beaten, and tortured. In a sixteen-count complaint against KFSH, Royspec, and the Kingdom of Saudi Arabia, Nelson and his wife attempt to state causes of action based on international law, common law torts, and derivative claims.[2]

Discussion

In two separate motions to dismiss, the Defendants question this court's subject-matter jurisdiction over the complaint. Nelson's complaint alleges that jurisdiction is premised upon diversity of citizenship, 28 U.S.C. § 1331, and the Alien Tort

[1]Defendants allege that Nelson was arrested when the government discovered he had misrepresented his credentials, rather than in retaliation for reporting safety violations; however, those disputed facts are not relevant to the motions to dismiss.

[2]In a separate complaint, case no. 88-0484-Civ-Nesbitt, the Nelsons are suing HCA and HCA International Company for negligent failure to warn of the hazards associated with working in Saudi Arabia. Although the cases arise from the same facts, the two actions were never officially consolidated by any order of this court.

Statute, 28 U.S.C. § 1350. In January of this year, however, the United States Supreme Court expressly held that "the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in federal court." *Argentine Republic v. Amerada Hess Shipping Corp.*, 109 S.Ct. 683, 690 (1989). Therefore, this court's subject-matter jurisdiction, if it exists at all, must be premised upon 28 U.S.C. § 1330(a), which provides that the district courts shall have original jurisdiction of any action against a foreign state if the foreign state is not entitled to immunity under the FSIA.[3]

The FSIA grants immunity to foreign states, with certain exceptions outlined in § 1605. The parties agree that the only exception to immunity that might apply in this case is § 1605(a)(2), clause 1. That section states, "A foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case in which the action is based upon a commercial activity carried on in the United States by a foreign state." A "commercial activity carried on in the United States by a foreign state" is defined as commercial activity carried on by the foreign state and having "substantial contact with

[3]The question of whether a foreign state is entitled to immunity involves resolution of factual issues, complicated in this case by the separate complaint against two U.S. corporations. The United States Court of Appeals for the Eleventh Circuit has noted that a district court is not required to accept the allegations of a complaint as true if a 12(b)(1) motion attacks the asserted factual basis of jurisdiction. *See Eaton v. Dorchester Dev., Inc.*, 692 F.2d 727, 731 (11th Cir. 1982). Under the FSIA, however, the burden is on the party seeking immunity to establish that no exception to immunity applies. *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1378 (5th Cir. 1980) (citing H.R. Rep. No. 1487, 94th Cong. 2d Sess. 17 (1976); *Behring Internat'l, Inc. v. Imperial Iranian Air Force*, 475 F.Supp. 396, 405 & n. 9 (D.N.J. 1979)). Defendants in this case are in the position of having to prove a negative, with the advantage that the allegations of the complaint are *not* presumed to be correct. The court has been careful to confine its resolution of the jurisdictional issue to this case without resolving the disputed issues raised in the related case against HCA and HCA International.

the United States." 28 U.S.C. § 1603(e). A "commercial activity" is further defined as "either a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. § 1603(d).

The inquiry, therefore, is two-fold: first, did any of the Defendants carry on commercial activities having substantial contact with the United States, and second, are any of Nelson's claims based upon those commercial activities?

The parties do not dispute that Royspec, which maintains an office in Maryland and purchases supplies and equipment in the United States, carries on commercial activities in this country. The only commercial activities allegedly undertaken in this country by Saudi Arabia and KFSH, however, relate to Nelson's recruitment. Neither KFSH nor the Saudi government was directly involved in Nelson's recruitment; rather, KFSH or the government entered into a contract with a U.S. corporation, which performed the actual recruitment activities. The agreement with the American corporation may represent a commercial transaction, but Nelson was not a party to that contract. In fact, the agreement serves to separate the Saudi defendants from recruitment activities in the United States, because the U.S. corporation in essence acted as a middleman: Nelson dealt with the U.S. corporation, which in turn had an agreement with a Saudi governmental entity in Arabia.

Nelson's complaint, however, alleges that the recruitment arrangement established an agency relationship between the Defendants and the U.S. corporation. This allegation implicates the related case against HCA and HCA International, because Nelson seeks to hold the Saudi government responsible for any duty breached by its alleged agent. The court does not find it necessary to resolve the agency question, which may be a pivotal factual issue in the related case, because the link between the recruitment activities and the Defendants is not

sufficient to establish "substantial contact" with the United States.

In discussing the meaning of "substantial contact" under § 1603(e) of the FSIA, the United States Court of Appeals for the District of Columbia Circuit has referred to the statute's legislative history. That court noted that Congress gave several examples of substantial contact, such as transactions performed in whole or in part in this country, import-export transactions, business torts, and financing or loan agreements involving American financial institutions. *See Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1513 (D.C. Cir. 1988) (quoting H.R. Rep. No. 1487, 94th Cong., 2d Sess. 17, reprinted in U.S. Code Cong. & Admin. News 1976, pp. 6604, 6615, 6616). The Court finds that the recruitment activities purportedly undertaken by Defendants, albeit indirectly through their alleged U.S. agents, do not quality as substantial contact between a foreign state and the United States under any of these examples. Although the recruitment agreement could conceivably be considered a transaction performed in part in this country, the transaction involved only the Saudi government and a U.S. corporation. Nelson was not a party to that contract; rather, he was involved in a separate transaction with the U.S. corporation. The court therefore concludes that for purposes of Nelson's complaint, the Saudi defendants have not had substantial contact with the United States.

Nelson also argues that because he signed his employment contract with KFSH while in Miami, KFSH has had substantial contact with this country. The court disagrees. Nelson was interviewed by KFSH in Saudi Arabia, and the employment contract was to be performed in Saudi Arabia. It is a fortuitous happenstance that Nelson signed the agreement while in Miami, rather than while in Saudi Arabia or at some other location. As Congress noted, the definition of substantial contact

was "intended to reflect a degree of contact beyond that occasioned simply but U.S. citizenship or U.S. residence of the plaintiff." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 17 (1976).

For these reasons, the court concludes that neither KFSH nor Saudi Arabia has carried on commercial activity in the United States, as defined in § 1603(d) and (e) of the FSIA. The court has found, however, that Royspec has been engaged in commercial activity; accordingly, the court must proceed to the second step in the analysis and consider whether Nelson's complaint is based on Royspec's commercial activity.

Although the United States Court of Appeals for the Eleventh Circuit has not considered the interpretation of "based upon" as used in § 1602(a)(2), the former Fifth Circuit has stated that the focus of the inquiry "is on whether the particular conduct giving rise to the claim in question actually constitutes or is in connection with commercial activity." *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1379 (5th Cir. 1980). In discussing the *Arango* decision, as well as decisions from other federal courts, the current Fifth Circuit has noted that *Arango* is consistent with the so-called "nexus test," in which the court looks for a nexus between the commercial activity and the allegations of the complaint. *See Vencedora Oceanica Navigacion v. Compagnie Nationale Algerienne de Navigation*, 730 F.2d 195, 203 (5th Cir. 1984). Therefore, the appropriate inquiry in the instant case is whether Nelson's complaint has a connection or nexus with Royspec's commercial activity in this country.

As noted, Royspec is the purchasing agent for KFSH. The only connection between Royspec and Nelson is that Nelson was given Royspec's phone number in Maryland as a way for his family to contact him in the event of an emergency. The court finds absolutely no nexus between Royspec's business

and the torts alleged in Nelson's complaint (negligent failure to warn, battery, false imprisonment, and derivative claims by Vivian Nelson). Because no nexus exists between the torts and the commercial activity, the exception to immunity under § 1602(a)(2) is inapplicable to Royspec, and the court is therefore without subject-matter jurisdiction to consider Nelson's claims against Royspec.

Furthermore, even if the court had determined that KFSH and Saudi Arabia had carried on commercial activites having substantial contact with the United States through the indirect recruitment activities, the court would be unable to find a nexus between those activities and Nelson's complaint. A different question would be presented if Nelson had alleged some type of commercial cause of action arising from the employment contract.[4] The gravamen of Nelson's complaint, though, is an action for personal injuries under various theories of law. Although Nelson argues that but for his recruitment in the United States, he would not have taken the job, been arrested, and suffered the personal injuries, the court finds this "connection" far too tenuous to support jurisdiction over a foreign sovereign.

Similarly, the court finds that Nelson's causes of action based on negligent failure to warn have no nexus with commercial activities in this country. Such a conclusion is implicit in the finding that neither KFSH nor Saudi Arabia's commercial activities had substantial contact with the United States. Nelson argues that he should have been warned when recruited that the job for which he was hired (reporting safety violations to the Saudi government) involved the risk of imprisonment and torture. Nelson does not allege that the commercial activities

[4]The court recognizes, however, that if Nelson had pleaded a contract cause of action, the forum selection clause of the employment contract would require the parties to litigate in Saudi Arabia.

indirectly undertaken by the Saudi defendants in this country were for the purpose of imprisoning and torturing U.S. citizens. Again, the "connection" between the cause of action alleged and the Defendants' commercial activities would be too tenuous to support subject-matter jurisdiction over a foreign sovereign.

For the above-stated reasons, the court concludes that all three Defendants have met their burden of establishing sovereign immunity, and that the court lacks subject-matter jurisdiction to consider Nelson's claims against the Saudi defendants. The court therefore declines to reach the issue of whether the act of state doctrine would apply to the facts of this case.[5]

This cause will be DISMISSED for lack of subject-matter jurisdiction under 28 U.S.C. § 1330(a) by separate order. The trial date in case no. 88-0484-Civ-Nesbitt will also be set by separate order.

DONE and ORDERED in chambers, Miami, Florida, this 11th day of August 1989.

/s/ Lenore C. Nesbitt
LENORE C. NESBITT
UNITED STATES DISTRICT JUDGE

cc: Jorge A. Duarte, Esq.
Marc Cooper, Esq.
Maureen E. Mahoney, Esq.
Scott E. Perwin, Esq.

[5]The court also finds it unnecessary to consider the question of venue, although Defendants' motions devoted more time to that issue than to the question of subject-matter jurisdiction. It is axiomatic that the court must determine whether it has jurisdiction over a matter before reaching other issues.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-5981

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUL - 1 1991
MIGUEL J. CORTEZ
CLERK

SCOTT NELSON and VIVIAN NELSON,
Individually and as Husband/Wife,

Plaintiffs-Appellants,

versus

SAUDI ARABIA, KING FAISAL SPECIALIST
HOSPITAL, ROYSPEC,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

**ON PETITION FOR REHEARING AND
SUGGESTION OF REHEARING EN BANC**

(Opinion _____, 11th Cir., 1991, 923 F.2d 1528).
( )

Before: EDMONDSON and BIRCH, Circuit Judges, and RE*, Chief Judge.

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* Honorable Edward D. Re, Chief Judge of the United States Court of International Trade, sitting by designation, has retired from federal service and took no part in deciding the pertinent petition or suggestion. The petition was decided by a quorum. *See* 28 U.S.C. § 46(d); 11th Cir. R. 34-2(a).

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion of Rehearing En Banc is DENIED.

The decision in this case does not purport to address the applicability of the act of state doctrine to this case. This issue is open for the consideration of the district court on remand.

ENTERED FOR THE COURT:
/s/J.L. EDMONDSON
UNITED STATES CIRCUIT JUDGE

APPENDIX D
No. 89-5981

IN THE
United States Court of Appeals
FOR THE ELEVENTH CIRCUIT

SCOTT NELSON and VIVIAN NELSON,
Plaintiffs-Appellants,

v.

SAUDI ARABIA, *et al.*,
Defendants-Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

STATEMENT OF INTEREST OF THE UNITED STATES IN SUPPORT OF REHEARING AND SUGGESTION FOR REHEARING IN BANC

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CERTIFICATE OF INTERESTED PERSONS

The United States, as *amicus curiae*, adds the following names to the certificates previously filed by the parties: Department of Justice attorneys:

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REQUIRED STATEMENT FOR IN BANC SUGGESTION

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following precedent of this circuit, and consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court: *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371 (5th Cir. 1980).

I also express a belief, based on a reasoned and studied professional judgment, that this appeal involves the following questions of exceptional importance:

1. Whether inherently sovereign law enforcement activities of officials of a foreign state, carried out in that country, can be challenged in United States courts under the commercial activities exception to sovereign immunity in the Foreign Sovereign Immunities Act.

2. Whether jurisdiction exists under the Foreign Sovereign Immunities Act to challenge non-commercial foreign state conduct when separate commercial conduct is used to establish the required nexus with the United States for jurisdiction under that statute.

/s/ Douglas Letter
Attorney of record for *amicus curiae* United States

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IN THE
United States Court of Appeals
FOR THE ELEVENTH CIRCUIT

No. 89-5981

SCOTT NELSON and VIVIAN NELSON,
Plaintiffs-Appellants,

v.

SAUDI ARABIA, *et al.*,
Defendants-Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

STATEMENT OF INTEREST OF THE UNITED STATES IN SUPPORT OF REHEARING AND SUGGESTION FOR REHEARING IN BANC

INTEREST OF THE UNITED STATES

The United States files this Statement of Interest pursuant to 28 U.S.C. 517, which authorizes the Attorney General to attend to the interests of the United States in any pending suit, and Federal Rule of Appellate Procedure 29, permitting *amicus curiae* filings by the United States. We support rehearing and *in banc* consideration because the panel's opinion incorrectly applies an important federal statute with major foreign policy ramifications.

This case involves a suit filed in federal district court by two American citizens against a foreign state — Saudi Arabia — and two of its instrumentalities concerning the police activities of that state. A panel of this Court reversed the decision by the district court and found jurisdiction to sue these foreign defendants in a United States court under one part of the commercial activities section of the Foreign Sovereign Immunities Act (the FSIA) (28 U.S.C. 1602 *et seq.*).

The United States has a very substantial interest in the application of the FSIA, which is the only means by which foreign states may be sued in United States courts. See *Argentine Republic v. Amerada Hess Shipping Co.*, 488 U.S. 428, 434 (1987). Foreign relations depend to a large extent on reciprocal treatment between two states. Thus, if police activities of foreign states are deemed commercial and questioned and punished in United States courts, it is likely that the law enforcement conduct of the United States will also be called into account in foreign courts. And, American law enforcement officials will have to appear in foreign courts to defend their conduct.

Further, if the prevailing law in this country is that foreign police activity can be judged in our courts by our standards, it will be difficult or impossible for the United States successfully to claim immunity elsewhere for its own such sovereign activities. Even when local foreign law would permit the United States to raise immunity defenses that would not be available under the FSIA, the United States nevertheless uses that statute as a standard for our own claims of immunity in foreign courts. Under this practice, the United States would be foreclosed from asserting immunity for claims in foreign courts involving our law enforcement activity.

Consequently, although Congress has in the FSIA clearly assigned to the federal courts the responsibility to determine

whether foreign states may be sued here consistently with that statute, the Executive Branch — which is responsible for the foreign relations of the United States — has a keen interest in how the courts apply the law. The FSIA's "intent to deprive the Executive of a conclusive say in this area does not mean that the Executive is to avoid any role in the adjudicatory process." *Practical Concepts Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1552 n. 21 (D.C. Cir. 1987). The Executive Branch maintains a legitimate interest in the correct interpretation of the FSIA because of its foreign policy impact. *Id.* at 1545 n. 2.

As described below, we believe that the panel decision here erroneously applies the FSIA in a serious way. Plaintiffs' complaint focuses on the conduct of Saudi police authorities in arresting and jailing Scott Nelson. The panel deemed the charges justiciable because it found a "nexus" between the alleged tortious police activity of the Saudis and Saudi commercial activity in the United States.

But this reasoning is flawed because, although plaintiffs allege highly reprehensible conduct by Saudi officials, the fact remains that law enforcement activity is *sovereign* in nature. Congress had no intent in the FSIA to waive immunity, under the statute's commercial activities provision, for foreign governments to be sued here for their governmental acts such as police activities. Indeed, as far as we are aware, this is the first and only instance in which any federal court has found jurisdiction over foreign law enforcement activities under the FSIA commercial activities exception.

Substantial precedent from this Court and other courts of appeals supports our view, and casts grave doubt on the panel ruling.

Moreover, the panel separately erred in finding a sufficient nexus between the commercial activity in the United States

and the conduct actually being challenged. Its ruling on this point is inconsistent with many other circuit decisions which make clear that the commercial activity providing the jurisdictional nexus with the United States must itself be the activity on which the lawsuit is based. Here, it is not.

We nevertheless wish to make clear at the outset that the United States takes *no* position regarding the underlying merits in this case. Plaintiffs have alleged beatings and torture by Saudi agents, activity that we strongly condemn. The record reveals, however, that there is sharp disagreement regarding the facts underlying plaintiffs' claims.

Officials from the United States Department of State have had extensive contact with both the plaintiffs and with the Saudi government regarding this matter. We have attempted to assure that the plaintiffs will have an appropriate forum in which to present their claims. This process is ongoing. If it fails, the United States retains the option of espousing plaintiffs' claims against Saudi Arabia — if it finds them to have merit — as an official matter between the two governments.

Nevertheless, our position is that Congress did not make the types of claims at issue here cognizable in United States courts, and that the panel's interpretation of the FSIA is likely to cause serious difficulties for the United States in future cases brought in foreign courts.[1] We therefore urge that the panel grant rehearing or that the full Court hear this case *in banc*.

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[1]Because plaintiffs have alleged highly reprehensible conduct by a foreign state, this case calls to mind the observation by the Second Circuit in a difficult case also involving asserted heinous activity, but in which foreign sovereign immunity was upheld, *Letelier v. Republic of Chile*, 748 F.2d 790, 791 (2d Cir. 1984), *cert denied*, 471 U.S. 1125 (1985) ("How one wishes to decide a case comes lightly to mind, on a wing; but often how one must decide it comes arduously, weighed down by somber thought. To rule otherwise here would only illustrate once again that hard cases make bad law").

STATEMENT

1. *The FSIA Scheme*

In *Jackson v. People's Republic of China*, 794 F.2d 1490, 1492-93 (11th Cir. 1986), *cert. denied*, 480 U.S. 917 (1987), this Court described the shift in the United States from granting absolute immunity to foreign states in the federal courts to a restrictive theory of immunity, under which immunity is confined to suits involving public acts of a foreign state. This restrictive theory was codified in the FSIA in 1976. *Id.* at 1493.

In that statute, Congress drew a critical distinction between the commercial acts of foreign states and their public or sovereign ones. "Where a foreign state's sovereign acts are the basis of a suit, the United States refrains from exercising jurisdiction out of respect for the defendant's coequal sovereign status." *de Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1391 (5th Cir. 1985).

Relevant to this case is the FSIA waiver of foreign sovereign immunity for cases "in which the action is based upon a commercial activity carried on in the United States by a foreign state***." 28 U.S.C. 1605(a)(2). That is the section upon which jurisdiction was found by the panel here.

"[C]ommercial activity" is defined in the FSIA as "either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. 1603(d).[2]

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[2]The FSIA also contains a waiver for certain tort actions (28 U.S.C. 1605(a)(5)), but that section is not applicable here because it covers only cases in which the damage or loss occurs in the United States. See *Amerada Hess*, 488 U.S. at 439-41.

2. *This Litigation*

Plaintiff Scott Nelson is an American citizen who answered an advertisement concerning employment in Saudi Arabia in the King Faisal Specialist Hospital (the Hospital), a government instrumentality. The recruitment was conducted by the Hospital Corporation of America, an American company operating in this country under a contract with the Saudi government. See *Nelson v. Saudi Arabia*, 923 F.2d 1528, 1530 (11th Cir. 1991).

Nelson was interviewed in Saudi Arabia, and accepted employment as an engineer with the Hospital, signing the employment contract in the United States. As part of the hiring process, Nelson submitted what he now concedes is a fraudulent diploma from the Massachusetts Institute of Technology. *Id.* at 1530, 1536.

Nelson began work at the Hospital in Saudi Arabia, and part of his job included monitoring equipment in the Hospital building. Nelson contends that in March 1984, he found a building safety hazard, which the reported to Saudi authorities. The Saudis meanwhile discovered the fraudulent nature of Nelson's diploma, and in September 1984 he was summoned to the Hospital security office. *Id.* at 1530.

Nelson contends that he was taken from the Hospital to a jail, where he was beaten and tortured by Saudi officials. He was incarcerated for 39 days and was released following his pardon by the Saudis after intervention by United States authorities. *Id.* at 1530.

Several years after returning to the United States, Nelson filed this action against Saudi Arabia, the Hospital, and a Saudi agency doing procurement business in this country. He claims serious physical injuries and raises a number of tort causes of action including battery, unlawful detainment, wrongful arrest and imprisonment, inhuman torture, and negligent failure to warn that these torts might occur.[3] The district court dismissed the complaint, finding a lack of sufficient ties between the alleged tortious conduct and any commercial conduct by the Saudis.

A panel of this Court then reversed that ruling in an opinion written by Chief Judge Re of the United States Court of International Trade, sitting by designation. 923 F.2d at 1536. It found jurisdiction solely under the FSIA exception for commercial activity carried on in the United States by a foreign state. *Id.* at 1533.

The panel held that the "recruitment and hiring [of Nelson] in the United States constituted a 'commercial activity' of Saudi Arabia, within the mearning [sic] of the FSIA." *Ibid.* It then stated that cases applying the FSIA require that there be a nexus "between the acts for which damages are sought, and the foreign sovereign's commercial activity." *Id.* at 1534. The panel concluded that jurisdiction was present because "the detention and torture of Nelson are so intertwined with his employment at the Hospital that they are 'based upon' his recruitment and hiring, in the United States, for employment at the Hospital in Saudi Arabia." *Id.* at 1535.

Because there was this connection, the panel found jurisdiction under the commercial activities exception despite the fact that Nelson was complaining about police activities. *Id.* at 1534-35.

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[3]Nelson also sued the Hospital Corporation of America in a separate action which was dismissed under the statute of limitations and for contributory negligence stemming from Nelson's submission of the falsified diploma; that ruling is now on appeal to this Court. See *Nelson v. Hospital Corp. of America*, No. 88-0484-CIV-Nesbitt (S.D. Fla. Nov. 1, 1990).

REASONS FOR GRANTING REHEARING

This is one of those rare instances in which rehearing is warranted because the panel opinion radically departs from established law and is at odds with Congress' intent. It is difficult or impossible to square the ruling here with the Court's precedent in *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371 (5th Cir. 1980)[4], and the opinion is inconsistent with a number of decisions by other circuits interpreting the FSIA.

1. In *Arango*, the plaintiffs there sued Dominicana, a state airline, after they were refused admission to the Dominican Republic by immigration officials, and were immediately rerouted elsewhere, being manhandled in the process. This Court first dismissed the appeal, but then issued guidance to the district court for its further handling of the case. Dominicana contended that it could not be sued for claims arising out of the acts of Dominican immigration officials, which are not commercial in nature, even though the airline admitted that it engaged in commercial activity in the United States and had carried the Arangos to the Dominican Republic.

The Court accepted this argument because Dominicana's actions regarding the rerouting of the Arangos was not commercial; the airline was merely pressed into the service of carrying out a governmental law enforcement function: refusal to allow entrance and bodily expelling the Arangos from the Dominican Republic. 621 F.2d at 1379.

As in the case at bar, the allegedly tortious activity was certainly connected with commercial activity since Dominicana flew the Arangos to the Dominican Republic on a paid ticket. Yet, the police activity of which the Arangos complained was

[4]See *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (*in banc*).

not cognizable in a United States court because it was sovereign in nature, and was not the activity that provided the jurisdictional nexus to the United States. By contrast, the Court permitted other causes of action by the Arangos to go forward since they challenged conduct of a commercial kind. 621 F.2d at 1379-80.

The panel ruling at bar cannot be squared with *Arango* because it permits review of foreign law enforcement conduct, which is closely analogous to the activity which the Court there held could not be reviewed in United Sates courts.

2. In addition to being in conflict with *Arango*, the decision here is at odds with considerable precedent from other circuits which does not permit review of inherently sovereign activity — such as law enforcement conduct — under the commercial activities exception.

The legislative history of the FSIA shows that Congress did not intend any of the various clauses of the commercial activities exception to remove immunity for essentially non-commercial acts. To the contrary, the relevant discussion in the House and Senate reports makes clear that Congress intended that only actual commercial activity itself be covered within this exception. See H.R. Rep. 94-1487, 94th Cong., 2d Sess. 16, 18-19 (1976); S. Rep. No. 94-1310, 94th Cong., 2d Sess. 18-19 (1976). Both reports speak of allowing suits for acts that are "commercial or private in nature." *Ibid.*

This congressional intent was recognized and applied by the Ninth Circuit in *Gregorian v. Izvestia*, 871 F.2d 1515, 1521-22 (9th Cir.), *cert. denied*, 110 U.S. 237 (1989), a case in which the United States also filed a statement of interest in order to call the court's attention to the sovereign nature of the activity involved.

In *Gregorian*, the plaintiff claimed that a Soviet Union publica-

tion had libeled him as part of a strategy to cheat him in a commercial venture; the libel was alleged to be directly related to commercial activity. Nevertheless, the Ninth Circuit held that determination of the contents of an official newspaper is a sovereign act rather than a commercial one, despite the fact that publication of a newspaper can be commercial. Because the actual activity challenged by the plaintiff was sovereign, it was not covered by the commercial activities exception in the FSIA. *Id.* at 1522. Accord *Tucker v. Whitaker Travel, Ltd.*, 620 F. Supp. 578, 584 (E.D. Pa. 1985) (decision on how to "police the activities of its citizens" is "peculiarly governmental and may not be subjected to scrutiny in United States courts"), *aff'd*, 800 F.2d 1140 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986).

In another case closely analogous to this one, the court in ***Herbage v. Meese***, 747 F. Supp. 60 (D.D.C. 1990), similarly found no jurisdiction under the FSIA for claims made against agents of the British government for assertedly wrongful extradition to the United States. The court held that a British constable, detective, and prosecutor were all carrying out sovereign functions in arresting and extraditing the plaintiff. Citing *Arango*, the court determined that there was no waiver under the FSIA for this type of governmental law enforcement conduct. This conclusion held regardless of the plaintiff's allegations that the acts taken by the British police officers were "illegal" and "heinous." *Id.* at 66-67.

Here too, there is no jurisdiction under the FSIA commercial activities exception to immunity because the acts at issue were plainly governmental. Nelson attacks the police conduct of Saudi officials in arresting and confining him. This type of conduct is clearly sovereign rather than commercial; in contrast to commercial activity, it can be carried out only by a government. It is, therefore, not covered by the FSIA com-

mercial activities exception, regardless of whether or not it is intertwined with commercial activity.[5]

As explained in the opening section of this brief, a contrary conclusion is against congressional intent. And, it must be recognized that review of this kind of sovereign activity by a United States court would require examination of Saudi police officials here, as well as questioning in our courts their conduct of police activities in their own country. The panel's ruling is thus likely to expose the United States' own law enforcement conduct to judicial scrutiny in foreign courts.

Numerous cases make clear that it makes no difference for FSIA purposes whether the governmental activity in question is intertwined with commercial activity.

For example, in ***de Sanchez***, 770 F.2d at 1391-92, the Fifth Circuit found no jurisdiction when a plaintiff sued to collect on a check issued by the Nicaraguan Central Bank for payment of a certificate of deposit payable in U.S. dollars. The stop payment order was made by the same Central Bank based on then-current policies regarding preservation of foreign exchange reserves. That act clearly had a nexus to the commercial activity of sale of the certificate of deposit, and the usually commercial activity of sale of foreign currency. But that connection was not sufficient because the key activity was the sovereign one of determining not to honor the payment check. Accord, *Millen Industries, Inc. v. Coordination Council for North American Affairs*, 855 F.2d 879, 884-85 (D.C. Cir. 1988); *MOL, Inc. v. The People's Republic of Bangladesh*, 736 F.2d 1326, 1328 (9th Cir.), *cert. denied*, 469 U.S. 1037 (1984).

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[5]Nelson has also alleged a cause of action for failure to warn that he may be subjected to the type of wrongful conduct that he alleges. However, since that cause of action would require review of the sovereign police activities, the failure to warn claim should not stand on its own.

And, in *Letelier*, the Second Circuit declined to approve execution against the Chilean national airline in a case concerning assassination of a former Chilean ambassador in the United States, and airline personnel were assertedly involved in the plot. 748 F.2d at 797. The airline clearly engaged in commercial activity here, but the act in question was a governmental one — state sponsored assassination. That act was immune under the FSIA even though airline personnel had allegedly taken actions — such as providing transportation — to make the assassination possible. *Id.* at 794. Citing this Court's decision in *Arango*, the Second Circuit focused on the allegedly wrongful activity itself, and held that any participation by the airline in the plot was not commercial in nature. *Id.* at 797-98.

The ruling here is firmly at odds with these holdings.

3. Additionally, the panel here erred in concluding that there is a sufficient connection between the allegedly tortious conduct of the Saudi police officials and the commercial activity found to occur in the United States. In finding such a connection, the panel applied an analysis rejected by other courts of appeals.

For example, in *Stena Rederi AB v. Comision de Contratos del Comite*, 923 F.2d 380 (5th Cir. 1991), the Fifth Circuit made clear that FSIA jurisdiction *cannot* be based merely on activity that is intertwined with commercial activity. Rather, the court explained — relying on *Arango* — that "[i]n order to satisfy the commercial activities exception to sovereign immunity, the commercial activity that provides the jurisdictional nexus with the United States must also be *the activity on which the lawsuit is based.*" *Id.* at 387. Accord *ibid.* ("[b]ecause Pemex's commercial acts do not form the basis for Stena's complaints, the commercial activities exception does not apply").

Here, the commercial activity relied upon by the panel is the recruitment and hiring of Nelson in the United States. Nelson's claims are based not on those activities, but on the actions of the Saudis who jailed him. Thus, the nexus between the relevant commercial activity and the allegedly tortious conduct is *not* the same as the connection between the commercial activity and the United States. The panel confused this key difference.

CONCLUSION

For the foregoing reasons, as *amicus curiae*, the United States urges that the panel rehear this case, or that the full Court consider it *in banc*.

Respectfully submitted,

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